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No. 85-999

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the one-black-for-one-white promotion quota adopted by the district court, and sustained by the court of appeals, is permissible under the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the court of appeals were as follows: the United States of America; Phillip Paradise, Jr., and the class he represents; the Alabama Department of Public Safety and its director, Byron Prescott; V. E. McClellan, William M. Bailey, D. B. Mansell, Dan Davenport, and the class they represent.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Introduction and summary of argument	15
Argument:	
The one-black-for-one-white promotion quota ordered by the district court is not narrowly tailored to achieve a compelling governmental interest, and it is therefore unconstitutional under the equal protection guarantees of the Fifth and Fourteenth Amendments	17
A. A racial classification must be narrowly tailored to achieve a compelling governmental interest in order to satisfy strict constitutional scrutiny	17
B. The promotion quota ordered by the district court is not narrowly tailored to remedy the Department's past discrimination	21
C. Promotion quotas like that ordered by the district court cannot be justified as "catch-up" measures designed to accelerate the achievement of racial proportionality or balance	30
D. The one-for-one promotion quota, whatever its purpose, unnecessarily and severely burdens innocent persons, and it therefore fails to satisfy strict scrutiny	36
Conclusion	42

TABLE OF AUTHORITIES

Cases:

Albermarle Paper Co. v. *Moody*, 422 U.S. 405	25
Baker v. *City of Detroit*, 483 F. Supp. 930	25
Bazemore v. *Friday*, No. 85-93 (July 1, 1986)	34

Cases—Continued: Page

Bridgeport Guardians, Inc. v. *Members of Bridgeport Civil Service Comm'n*, 482 F.2d 1333 41
Clady v. *City of Los Angeles*, 770 F.2d 1421 25
Connecticut v. *Teal*, 457 U.S. 440 25
Dayton Bd. of Educ. v. *Brinkman*, 433 U.S. 406 34
DeFunis v. *Odegaard*, 416 U.S. 312 37
Dunn v. *Blumstein*, 405 U.S. 330 19
Firefighters v. *Cleveland*, No. 84-1999 (July 2, 1986) 20
Firefighters Local Union No. 1784 v. *Stotts*, 467 U.S. 561 ..... 13, 15, 17, 39, 41
Franks v. *Bowman Construction Co.*, 424 U.S. 747 40
Fullilove v. *Klutznick*, 448 U.S. 448 ..... 18, 19, 20, 37, 38, 42
Hishon v. *King & Spaulding*, 467 U.S. 69 40
Kirkland v. *New York State Dep't of Correctional Services*, 520 F.2d 420, cert. denied, 429 U.S. 823 .. 41
Kramer v. *Union Free School District*, 395 U.S. 621 19
McLaughlin v. *Florida*, 379 U.S. 184 19
Milliken v. *Bradley*:
418 U.S. 717 33
433 U.S. 267 34
NAACP v. *Allen*, 340 F. Supp. 703, aff'd, 493 F.2d 614 ..... 2, 21, 25, 35, 40
Palmore v. *Sidoti*, 466 U.S. 429 19
Paradise v. *Prescott*, 580 F. Supp. 171 9
Paradise v. *Shoemaker*, 470 F. Supp. 439 ..... 3, 21, 36
Pasadena City Bd. of Educ. v. *Spangler*, 427 U.S. 424 33
Regents of the University of California v. *Bakke*, 438 U.S. 265 ..... 16, 18, 31, 37
Shapiro v. *Thompson*, 394 U.S. 618 19
Sheet Metal Workers v. *EEOC*, No. 84-1656 (July 2, 1986) 16, 25, 29, 31, 32, 33, 39, 41
Sledge v. *J.P. Stevens & Co.*, 585 F.2d 625, cert. denied, 440 U.S. 981 41
Spencer v. *Kugler*, 404 U.S. 1027 33
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 ..... 33, 34
Teamsters v. *United States*, 431 U.S. 324 ..... 26, 37

Cases—Continued: Page

United Jewish Organizations v. *Carey*, 430 U.S. 144 37
United States v. *City of Chicago*, 663 F.2d 1354 ..... 26, 41
United Steelworkers v. *Weber*, 443 U.S. 193 ..... 11, 23
Vuyanvich v. *Republic Nat'l Bank*, 505 F. Supp. 224 25
Washington v. *Davis*, 426 U.S. 229 34
Wygant v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986) ..... *passim*
Yick Wo v. *Hopkins*, 118 U.S. 356 18

Constitution, statute and regulations:

U.S. Const.:
Amend. V 17
Amend. XIV (Equal Protection Clause) 14, 17
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 14, 15, 28, 29
§ 706(g), 42 U.S.C. 2000e-5(g) 20
29 C.F.R.:
Section 1607 5
Section 1607.1(B) 5
Section 1607.4(D) 7, 10

Miscellaneous:

K. Abraham & J. Medoff, National Bureau of Economic Research, *Years of Service and Probability of Promotion* (1983) 40
Bureau of Labor Statistics, *Current Population Survey* (Jan. 1983) 40
Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723 (1974) 20
Fallon & Weiler, Firefighters *v.* Stotts: *Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. 1 40
Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1 37-38
Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290 (1978) 5, 6, 9, 10, 12, 13, 25, 28

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 767 F.2d 1514. The order and memorandum opinion of the district court (Pet. App. 55a-64a; J.A. 128-137) are reported at 585 F. Supp. 72.

JURISDICTION

The judgment of the court of appeals (Pet. App. 83a-84a) was entered on August 12, 1985. On November 5, 1985, Justice Powell extended the time

within which to file a petition for a writ of certiorari to and including December 10, 1985. The petition was filed on that date and was granted, limited to the third question presented, on July 7, 1986 (J.A. 178). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This dispute arises from a lawsuit challenging discrimination in hiring by the Alabama Department of Public Safety (the Department). The original class action was brought by the NAACP in January 1972. The United States was joined as a party plaintiff, and Phillip Paradise, Jr., was permitted to intervene on behalf of a class of black plaintiffs (Paradise) shortly thereafter (Pet. App. 3a).

In 1972, the district court held that the Department had violated the Fourteenth Amendment by "engag[ing] in a blatant and continuous pattern and practice of discrimination in hiring." *NAACP* v. *Allen*, 340 F. Supp. 703, 705 (M.D. Ala.) (*reprinted at* J.A. 23). This finding of discrimination was based in part upon the "unexplained and unexplainable" fact that "[i]n the thirty-seven-year history of the patrol there has never been a black trooper and the only Negroes ever employed by the [D]epartment have been nonmerit system laborers." *Ibid.* The court ordered the Department to hire one black trooper for each white trooper hired until blacks comprised approximately 25% of the state trooper force. 340 F. Supp. at 706 (*reprinted at* J.A. 27). The court directed that "eligible and promotional registers heretofore used for the purpose of hiring troopers be * * * abrogated," and it enjoined the Department from "engaging in any employment

practices, including * * * promotion * * *, for the purpose or with the effect of discriminating against any employee * * * on the ground of race or color." 340 F. Supp. at 706-707 (*reprinted at* J.A. 27-28). The court of appeals affirmed the district court's order. 493 F.2d 614 (5th Cir. 1974).

In 1975, the district court granted supplemental relief to the plaintiffs. It found that the Department, "for the purpose of frustrating or delaying full relief to the plaintiff class, [had] artificially restricted the size of the trooper force and the number of new troopers hired" (J.A. 34). The court enjoined the Department from engaging in such conduct and ordered it to file status reports concerning its progress in hiring blacks (*id.* at 35, 36).

In 1979, the Department sought clarification of the district court's 1972 order, "ask[ing] whether the [25%] hiring quota applies to the entire state trooper force or just to entry-level troopers." *Paradise* v. *Shoemaker*, 470 F. Supp. 439, 440 (M.D. Ala.). The Department pointed out that its "promotion policy prohibits lateral hiring and requires advancement through the ranks." Because the 1972 order "did not impose promotional quotas," the Department said, "the ratio of blacks in entry-level positions must approach 37.5 percent" in order for the overall trooper force to be 25% black. 470 F. Supp. at 441. The district court responded that the 1972 order requiring 25% black representation in the trooper force unambiguously "refers to the entire force of sworn officers, not just to those in the entry-level rank," and it ruled that the "law of the case" doctrine barred reconsideration of that issue (*ibid.*). In this regard, the court held:

> To modify this order would be to do less than the law requires, which is to eradicate the continuing effects of past unlawful practices. In 1972, defendants were not just found guilty of discriminating against blacks in hiring to entry-level positions. The Court found that in thirty-seven years there had never been a black trooper at any rank. One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state troopers at the rank of corporal or above, *there is still not one black*. The [hiring] quota fashioned by the Court provides an impetus to promote blacks into those positions. To focus only on the entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest.

470 F. Supp. at 442 (emphasis in original). See J.A. 63; Pet. App. 10a-12a. The district court accordingly denied the Department's motion for supplemental relief (470 F. Supp. at 442).[1]

2. In 1979, after Paradise had moved for supplemental relief, the parties entered into a consent decree that for the first time addressed the issue of promotions. The Department generally agreed to "have as an objective * * * an employment and promotion system that is racially neutral" (J.A. 37)

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[1] The Department since 1975 has consistently complied with the one-for-one hiring quota. As of April 1983, the overall trooper force was "approximately 22%-23% black" (J.A. 62). Since the opinion below was issued, the percentage of blacks in the overall trooper force has apparently reached parity (25%). Accordingly, the defendants recently filed with the district court a motion requesting rescission of the hiring quota. See Defendants' Motion for Relief of Judgment (May 12, 1986).

and "not to engage in any act or practice which has a purpose or effect of unlawfully discriminating against blacks * * * [or] which discriminates on the basis of race in hiring, promotion, upgrading, training, assignment [or] discharge" (*id.* at 38). With respect to promotions, the Department agreed "to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion procedure when used either for screening or ranking will have little or no adverse impact upon blacks seeking promotion to corporal" (*id.* at 40).

In pursuit of these general objectives, the Department specifically agreed "to utilize a promotion procedure which is in conformity with the 1978 *Uniform Guidelines* [*on Employee*] *Selection Procedures*, 43 Fed. Reg. 38290, and which, in addition, when used either for screening or ranking will have little or no adverse impact on blacks seeking promotion to corporal" (J.A. 40).[2] The Department pledged to formulate a promotion procedure for the position of corporal that would be submitted for the plaintiffs' review and the court's approval "no later than one year from the signing of th[e] Consent Decree"—that is, by February 16, 1980 (*id.* at 40, 45). Once a new procedure for promotion to corporal had been validated, the Department agreed that it would "begin validation of a promotional procedure for the position of sergeant and, in turn, for the positions of

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[2] The *Uniform Guidelines*, currently set forth at 29 C.F.R. 1607, are a joint pronouncement of the EEOC, the Department of Justice, the Department of Labor, and the Civil Service Commission. The *Guidelines* "are designed to provide a framework for determining the proper use of tests and other selection procedures" to ensure nondiscrimination. 29 C.F.R. 1607.1(B).

lieutenant, captain, and major" (*id.* at 41). As an interim measure, the parties agreed to use the state merit system for all promotions to corporal (*ibid.*). The interim procedure was elaborated in a side agreement among the parties (*id.* at 46-48), and, pursuant to the consent decree and that agreement, we understand that four black troopers and six white troopers were promoted to corporal in February 1980. See *id.* at 46-48, 62.

3. In April 1981, some two years after the signing of the consent decree, the Department proposed a selection procedure for promotion to corporal and requested that the district court approve it.[a] The United States and Paradise filed a joint response objecting to the Department's proposal, maintaining that the examination had not been validated in accordance with the *Uniform Guidelines* and that its use would not be justified if the results had an "adverse impact" on black applicants (Pet. App. 12a; J.A. 50). In the hope of expeditiously establishing an acceptable promotion procedure, however, the parties, including the United States, entered into a second consent decree in August 1981 (J.A. 49-54). The parties thereby agreed that the proposed corporal's examination would be administered and scored; that the scores would be used in conjunction with other factors to rank applicants on a promotion register; and that the promotion register would "be reviewed to determine whether the selection procedure has an adverse impact against black applicants" (*id.* at 51).

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[a] The proposed promotion procedure was composed of four components, weighted as follows: written examination (60%), length of service (10%), supervisory evaluation (20%), and service ratings (10%). See J.A. 55-57; Pet. App. 12a & n.8.

The parties further agreed that the determination of whether the proposed procedure had an "adverse impact" would be "measured by the 'four-fifths rule' set forth in * * * the *Uniform Guidelines*" (J.A. 52). Under the "four-fifths rule," the proposed promotion procedure would be judged to have an adverse impact on blacks if it produced a selection rate for black applicants that was less than 80% of the selection rate for white applicants. See 29 C.F.R. 1607.4(D). If the proposed procedure turned out to have such an "adverse impact," the Department was to come up with an alternative procedure for making promotions to corporal "in a manner that does not result in adverse impact for the initial group of promotions or cumulatively" (J.A. 52, 53). If the proposed procedure proved unsatisfactory and the parties were unable to agree on a new procedure, the matter was to be "submitted to the [c]ourt for resolution" (*id.* at 53). No further promotions to corporal were to be made until a satisfactory procedure was put in place (*ibid.*).

In accordance with the consent decree, the Department in October 1981 administered its written corporal's examination to 262 applicants, of whom 60 (or 23%) were black (Pet. App. 14a; J.A. 119). A promotion register was prepared based on the examination results and the other relevant factors. See page 6 & note 3, *supra*. Of the 60 blacks who took the test, only five were listed in the top half of the register and the highest-ranked black was number 80 (Pet. App. 14a; J.A. 119). Rank-ordered use of the register would thus have resulted in no blacks being promoted to corporal even if 79 troopers were promoted (J.A. 120). In June 1982, the Department advised the United States that there was a current

need for eight to ten promotions to corporal, and that a total of 16 to 20 corporal promotions were expected to be made from the 1981 register before the formulation of a new list (Pet. App. 14a). The United States objected to rank-ordered use of the 1981 register, contending that "such use would result in substantial adverse impact on black applicants," and suggested that the Department should submit an alternative proposal for making promotions in conformity with the 1979 and 1981 consent decrees (*id.* at 14a-15a). No such proposal was submitted, and no promotions were made, during the next nine months.

4. In April 1983, Paradise moved the district court for an order enforcing the terms of the two consent decrees (Pet. App. 15a; J.A. 58). He urged that the selection procedure for corporals administered in 1981 had had a demonstrably adverse impact on black applicants (Pet. App. 15a; J.A. 60), and he sought an order directing the Department to comply with the consent decrees by implementing acceptable promotion procedures, both for the rank of corporal and for the higher ranks (*id.* at 58). He also sought an order directing the Department immediately "to promote qualified blacks to the corporal position at a rate that does not result in adverse impact and which is within the spirit of * * * the parties' consent decrees" (*id.* at 59). Specifically, referring to the hiring quota imposed in 1972, Paradise submitted that "blacks should be promoted to corporal at the same rate at which they have been hired, 1 for 1, until such time as the defendants implement a valid promotional procedure" (*id.* at 62). Paradise argued that a promotion quota would "encourage defendants to develop a valid promotional

procedure as soon as possible" and would "help to alleviate the gross underrepresentation of blacks in the supervisory ranks of the Department" (*ibid.*).

The United States agreed that the consent decrees should be enforced by ordering some promotions, stating that the Department's failure to come up with a promotion plan in conformance with the consent decrees "suggests that a pattern of discrimination against blacks in the Department * * * may be continuing" (Pet. App. 15a-16a & n.10). The United States opposed, however, the imposition of a one-black-for-one-white promotion quota as a method of enforcing the consent decrees (*ibid.*). Four white troopers moved to intervene on behalf of a class (intervenors) composed of the top-ranked white applicants on the 1981 promotion register (J.A. 81-87). They urged principally that the 1981 corporal's exam had been administered "in a racially neutral and non-discriminatory manner" and that its results should be effectuated (*id.* at 107).

In an order entered October 28, 1983, the district court agreed with the United States and Paradise that the 1981 promotion procedure was unacceptable under the consent decrees because it had an "adverse impact" on black applicants. *Paradise* v. *Prescott*, 580 F. Supp. 171 (M.D. Ala.) (*reprinted at* J.A. 117-124). The court noted that the Department "need[ed] additional corporals and * * * need[ed] at least 15 of them as soon as possible" (J.A. 119). Applying the "four-fifths rule" of the *Uniform Guidelines*, the court observed that, if the 1981 promotion register were used in rank order, "the success rate for white persons would be 15/202 or 7.4%, and the success rate for black persons would be 0/60 or 0%" (J.A. 120). Pointing out that "[z]ero is, of course,

less than four-fifths of 7.4," the court suggested that, "[s]hort of outright exclusion based on race, it is hard to conceive of a selection procedure which would have a greater discriminatory impact" (J.A. 120-121).[4] The court ordered the Department to submit, by November 10, 1983, "a plan to promote to corporal, from qualified candidates, at least 15 persons in a manner that will not have an adverse racial impact" (J.A. 123).

On November 10, 1983, the Department duly filed with the court a proposal to promote 15 troopers to the rank of corporal, of whom 11 (or 73%) would be white and four (or 27%) would be black (J.A. 125-126). In support of this proposal, the Department stated that it had "an immediate need for at least fifteen * * * Corporals," that "this percentage of blacks to whites reflects the percentage of blacks to whites who took the Corporal's examination," and

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[4] The Department and the intervenors contended that rank-ordered use of the 1981 promotion register would not work an "adverse impact" under the four-fifths rule, noting the *Guidelines'* caveat that "[g]reater differences in selection rate may not constitute adverse impact * * * where special recruiting or other programs cause the pool of minority * * * candidates to be atypical" (29 C.F.R. 1607.4(D)). The Department argued "that the one-to-one hiring ratio for state troopers is a 'special program' which has resulted in an atypical pool because black troopers scored lower on a 'hiring test' than did white troopers" (J.A. 121). The district court rejected this argument, agreeing with the United States and Paradise that a hearing was unnecessary on this question and that the Department's proffered evidence was "an unacceptable basis [on which] to rest a claim of atypicality" (*ibid.*). The court stated that "[t]he hiring test, to which the defendants wish to link their promotion procedure, has not been subjected to an adverse impact determination, nor has it been validated" (*ibid.* (footnote omitted)).

that this proposal would meet "the requirements of the four-fifths rule of the *Uniform Guidelines* concerning adverse impact" (*ibid.*). The Department pledged to cooperate with the Alabama Department of Personnel to develop a permanent procedure for promotion to corporal "as soon as possible" (*id.* at 126). The United States did not oppose the Department's proposal, but Paradise continued to insist upon a one-for-one promotion quota (Pet. App. 18a-19a).

5. On December 15, 1983, the district court granted Paradise's motion to enforce the consent decrees (J.A. 128-129). As Paradise had requested, the court imposed a quota requiring the Department "to promote from this day forward, for each white trooper promoted to a higher rank, one black trooper to the same rank, if there is a black trooper objectively qualified to be promoted to the rank" (*id.* at 128). The court ordered this promotion quota to "remain in effect as to each trooper rank above the entry-level rank until either approximately 25% of the rank is black or the [Department has] developed and implemented a promotion plan for the rank which meets the prior orders and decrees of the court and all other relevant legal requirements" (*ibid.*). The court found that the quota was necessary to cure "racial imbalances in the upper ranks" (*id.* at 135) and that it was "reasonable" under *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). See J.A. 135-136. The court said that the Department "ha[d] the prerogative to end the promotional quotas at any time, simply by developing * * * promotion procedures" in compliance with the consent decrees, so that the quota might prove "to be a one-time occurrence" (J.A. 136). Finally, the court ordered the Department to submit within 35 days "a schedule for the

development of promotion procedures for all ranks above the entry-level position" (J.A. 129). The Department, the intervenors, and the United States appealed from the December 13, 1983, order.

In February 1984, eight blacks and eight whites were promoted to corporal under the quota (Pet. App. 22a). The Department filed its schedule with the court as required, pledging to develop an acceptable procedure for promotion to corporal within five months (Pet. App. 45a; J.A. 151). The Department duly submitted its proposal on June 19, 1984, and moved the district court to approve it (Pet. App. 45a-47a; J.A. 144-145). The United States expressed the view that the proposed procedure would not have an "adverse impact" upon black applicants and hence was acceptable under the consent decrees (Pet. App. 48a; J.A. 159-161). The other parties, except for the intervenors, agreed with that assessment (see Pet. App. 48a; J.A. 146-150, 157).

On July 27, 1984, the district court ruled that the Department could promote up to 13 troopers to corporal in accordance with the newly proposed selection procedure (J.A. 163-164). The one-for-one promotion quota was temporarily suspended for that purpose (*id.* at 164). The court retained jurisdiction to decide whether future uses of the selection procedure for corporals were similarly without an "adverse impact" on blacks, and it ordered the parties to proceed with discovery to determine whether the procedure could be validated as job-related under the *Uniform Guidelines* (*ibid.*). After the intervenors' motion for a stay was denied (*id.* at 167-175), 13 troopers were promoted to corporal, of whom three were black and ten were white. See Pet App. 47a; J.A.

160. The intervenors alone appealed from the July 27, 1984, order (Pet. App. 48a; J.A. 165).[5]

6. The court of appeals consolidated the various appeals from the district court's December 15, 1983, order and the intervenors' appeal from the July 27, 1984, order and affirmed the district court in all respects (Pet. App. 1a-54a). The court first rejected the appellants' contention that the district court, in ordering the one-black-for-one-white promotion quota,

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[5] On August 16, 1984, after the district court had issued its order respecting promotions to corporal, the Department, pursuant to the agreed-upon schedule, submitted its proposed procedure for promotion to sergeant (J.A. 176). The district court ruled that the Department could promote up to 13 sergeants pursuant to that procedure, and it temporarily suspended the one-black-for-one-white quota for that purpose (Pet. App. 53a-54a n.19; J.A. 176-177). Promotions were made to sergeant (as they were previously made to corporal) from a "best qualified" list, on which two of thirteen candidates for sergeant were black. The one-for-one promotion quota has thus been applied in actual practice only once, and the question of the quota's constitutionality has limited retrospective importance since its invalidation could not lead to demotion of the eight blacks promoted under it. See *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 579 n.11 (1984). As we noted in our petition (at 7 n.3), however, the case is far from moot, because imposing the quota has continuing prospective effects. Although the quota has been temporarily suspended for promotions to corporal and sergeant, it could apply again if those selection procedures in the future produce an "adverse impact" on blacks or if they cannot be validated under the *Guidelines*. And while the quota does not now apply to promotions to ranks above sergeant because of the current absence of objectively qualified black applicants for such positions (Pet. App. 53a-54a n.19), the quota will eventually apply to such promotions unless the Department develops acceptable selection procedures for those ranks. We discuss the continuing effects of the quota at page 24, *infra*.

had "improperly modified, rather than enforced, the 1979 and 1981 [Consent] Decrees" (Pet. App. 23a). The court interpreted the consent decrees to bar an "adverse impact" only against blacks, and not against whites, seeking promotion (*id.* at 25a-26a). The court accordingly held that "the district court, faced as it was with the Department's representation that promotions needed to be made immediately, did not * * * exceed the relief authorized by those decrees when it granted plaintiffs' motion to enforce" (*id.* at 27a (footnote omitted)).

The court of appeals then held that the one-for-one promotion quota violated neither Title VII (Pet. App. 28a-35a), nor the Equal Protection Clause (*id.* at 35a-42a). On the constitutional issue, the court upheld the quota because of "the long history of discrimination in the Department" (*id.* at 39a) and because "the relief now at issue was designed to remedy the present effects of past discrimination" (*id.* at 40a). The court concluded that the promotion quota was "substantially related to the objective of eradicating [those] effects" and that it extended no further than necessary to remedy the "longstanding racial imbalances in the upper ranks of the Department" (*id.* at 41a). The court observed that the promotion quota was "a temporary measure" which would "cease to exist when * * * the Department succeeds in doing what it promised to do years ago" (*ibid.*). The court noted that the quota did not require the promotion of any unqualified black trooper, did not absolutely bar qualified white troopers "from advancement through the ranks," and did not "require the discharge or demotion of a white trooper or the replacement of a white trooper with a black trooper" (*ibid.*). The opinion contains no

discussion as to whether there existed any less intrusive or more narrowly tailored means of enforcing the Department's compliance with its obligations under the consent decrees.[6]

INTRODUCTION AND SUMMARY OF ARGUMENT

Since 1972 the United States has stood with the plaintiffs and the courts below in their efforts to end discrimination by the Alabama Department of Public Safety. We have urged and supported remedial efforts in respect to promotion as well as hiring. In our petition for certiorari we objected to only one of the district court's remedial provisions: the 1983 imposition of a one-for-one promotion quota for certain ranks, to remain in effect until the Department comes forward with a proper long-term procedure that does not have an adverse impact on black aspirants for promotion to each of these grades. That promotions be made according to the consent decrees and that promotions should thus display approximate parity with the applicant pool are propositions that are not in issue in this case.

In seeking certiorari, the principal purpose of the United States was to illuminate further the proposition we drew from *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984), that preferential relief under Title VII was available only to the actual

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[6] The court of appeals also rejected (Pet. App. 45a-53a) the intervenors' challenge to the district court's July 27, 1984, order permitting the proportional promotion of three black and ten white corporals. See *id.* at 47a; J.A. 160. The intervenors have not petitioned for review of that holding, and hence no question concerning it is presented here. The propriety of the subsequently ordered promotions to sergeant (see page 13 note 5, *supra*) is likewise not before this Court.

victims of discrimination, a proposition we asserted had constitutional dimensions as well. In *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), the Court stated last Term that race-conscious relief may be available in certain instances of egregious discrimination. We take that holding as a premise for our argument here, which addresses only the narrow question—the only question on which the Court granted review—whether the one-for-one promotion quota imposed in addition to and on top of the other relief (relief requiring a hiring quota and a proportionate promotion remedy) violates the Constitution. We believe the one-for-one promotion quota to be plainly unconstitutional in the light of the Court's recent pronouncements in *Sheet Metal Workers* and *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986).

First, particularly in light of the specific context in which it was superimposed, we believe this quota requires discrimination against innocent white state employees for no independently justifiable remedial purpose. The district court appears to have intended the one-for-one quota in part as an *in terrorem* device to compel the Department to adopt proper promotion procedures. In our view this puts the wrong gun to the wrong head, holding innocent white state troopers hostage for the purpose of ending the Department's alleged recalcitrance. The courts below appear also to have embraced a purpose to attain numerical "balance" of races at each level of the police force. This we believe goes well beyond a proper remedial purpose and cannot be justified under the Court's decisions in *Sheet Metal Workers*, *Wygant*, and *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

Second, even if either of these purposes were properly viewed as part of the remedy for the Department's clear and intentional pre-1975 hiring discrimination, nonetheless the one-for-one promotion quota imposes unnecessarily heavy burdens on a small number of identified white competitors for promotions, and is therefore unconstitutional for the same reason the layoffs in *Wygant* were found to be unconstitutional. Particularly in the context of civil service public employment, the prospects of regular promotion and an orderly progression through the ranks are an important aspect of a new entrant's career expectations. To diminish those prospects for a defined group of individual white entrants as drastically as this one-for-one quota would do is to blight those expectations—and on racial grounds—as surely as did the denial of job security pursuant to race-based lay-off quotas in *Wygant* and *Stotts*.

ARGUMENT

THE ONE-BLACK-FOR-ONE-WHITE PROMOTION QUOTA ORDERED BY THE DISTRICT COURT IS NOT NARROWLY TAILORED TO ACHIEVE A COMPELLING GOVERNMENTAL INTEREST, AND IT IS THEREFORE UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION GUARANTEES OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. A Racial Classification Must Be Narrowly Tailored To Achieve A Compelling Governmental Interest In Order To Satisfy Strict Constitutional Scrutiny

1. The proper standard by which to evaluate the constitutionality of race-conscious governmental action under the Equal Protection Clause is now clear. "[R]acial classifications of any sort must be subjected to 'strict scrutiny.'" *Wygant*, slip op. 1-2 (O'Connor, J., concurring in part and concurring in

the judgment). Strict scrutiny applies regardless whether the purpose of the discrimination is characterized as malevolent or benign, and regardless of the race of its victims. *E.g.*, *Bakke*, 438 U.S. at 294 (opinion of Powell, J.); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886). As the plurality stated in *Wygant*, "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subjected to governmental discrimination" (slip op. 5). Any less stringent analysis, such as a "test of 'reasonableness[,]' * * * has no support in the decisions of this Court" (*id.* at 10-11).[7]

Under strict scrutiny, " '[a]ny preference based on racial or ethnic criteria must necessarily receive

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[7] Justice White concurred separately in *Wygant* and thus did not join the opinion of the four Justices who explicitly stated that all racial classifications are subject to "strict scrutiny." As the plurality in *Wygant* noted, however, Justice White had previously joined that portion of Justice Powell's opinion in *Bakke* which stated that discrimination against nonminorities is to be assessed under this standard. See *Wygant*, slip op. 4, quoting *Bakke*, 438 U.S. at 291 (opinion of Powell, J., joined by White, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."). Thus, at least five Justices have subscribed to this position. See also *Fullilove* v. *Klutznick*, 448 U.S. 448, 551 (1980) (Stevens, J., dissenting). Three members of the Court have recently expressed the view that a somewhat less rigorous standard is appropriate where a racial classification discriminates against white persons. See, *e.g.*, *Wygant*, slip op. 7 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting). These Justices nevertheless have required a " 'strict and searching' * * * inquiry" in such instances. See *id.* at 7 (Marshall, J., dissenting). See also *Wygant*, slip op. 4 (Stevens, J., dissenting) (distinguishing between inclusionary and exclusionary measures).

a most searching examination to make sure that it does not conflict with constitutional guarantees.'" *Wygant*, slip op. 5 (plurality opinion), quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.). Thus, "to pass constitutional muster, [racial classifications] must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose." *Palmore* v. *Sidoti*, 466 U.S. 429, 432-433 (1984), quoting *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964). In order to be deemed "necessary to the accomplishment" of their purpose, moreover, laws employing racial or other inherently suspect classifications "must be drawn with precision * * * and must be tailored to serve their legitimate objectives." *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972) (original quotation marks omitted). If there are other reasonable ways to achieve those objectives, the government "may not choose the way of greater interference." *Ibid.* See, *e.g.*, *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

Strict scrutiny thus consists of "two prongs." *Wygant*, slip op. 5 (plurality opinion). "First, any racial classification must be justified by a compelling governmental interest. * * * Second, the means chosen by the [government] to effectuate its purpose must be narrowly tailored to the achievement of that goal." *Ibid.* (original quotation marks omitted). In other words, unless both the end and the means are permissible, a racial classification cannot stand.

2. It is of course clear beyond peradventure that the government has a "compelling interest" in remedying past discrimination practiced by a public employer. The standards for determining whether a

particular remedial measure is "narrowly tailored" to that end were elaborated last Term in *Wygant*. In holding racially based layoffs an impermissible remedy, the plurality stated that the term "narrowly tailored" in one sense "require[s] consideration whether lawful alternative and less restrictive means could have been used" (slip op. 11 & n.6). "Or, as Professor Ely has noted, the classification at issue must 'fit' with greater precision than any alternative means" (*ibid.*, quoting Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 n.26 (1974)). " 'Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification' " (*Wygant*, slip op. 11-12 (plurality opinion), quoting *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting)).[8]

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[8] The standards of "strict scrutiny" apply to the instant case even though the court of appeals ruled that the one-for-one promotion quota was designed to enforce the 1979 and 1981 consent decrees (Pet. App. 22a-27a) and that "those decrees * * * fully authorized the promotion quota" (*id.* at 40a). Although this Court held in *Firefighters* v. *Cleveland*, No. 84-1999 (July 2, 1986), that parties may voluntarily enter into a consent decree that exceeds the limitations of judicially ordered remedies provided by Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), the Court emphasized that "approval of a consent decree between some of the parties * * * cannot dispose of the valid claims of nonconsenting intervenors." *Firefighters*, slip op. 26. As Justice O'Connor there stated, "nonminority employees * * * remain free to challenge the race-conscious measures * * * as violative of their rights under * * * the Fourteenth Amendment." *Firefighters*, slip op. 1 (O'Connor, J., concurring). And even if nonminority employees had not been present as intervenors in the instant case, the Court "should not approve a consent decree that on its face provides for racially preferential treatment that would clearly violate * * *

B. The Promotion Quota Ordered By The District Court Is Not Narrowly Tailored To Remedy The Department's Past Discrimination

As we have stated, there can be no doubt that the government has a "compelling interest" in remedying racial discrimination practiced by a public employer. It is that interest which from the outset of this protracted litigation has been urged to justify the various race-conscious remedial measures ordered by the courts since 1972.[9] The United States has consistently maintained and the courts below have correctly concluded that the hiring discrimination originally practiced by the Department was "unquestionably a violation of the Fourteenth Amendment." *NAACP* v. *Allen*, 340 F. Supp. at 705. And as the courts below found, the Department's hiring discrimination for almost four decades had excluded blacks from any jobs at all, including jobs in the upper ranks (Pet. App. 10a-12a; J.A. 63). See also *Paradise* v. *Shoemaker*, 470 F. Supp. at 442. Given the pervasive past discrimination practiced by the De-

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the Fourteenth Amendment" (*ibid.*). In any event, the challenge here is not to the consent decrees per se, but to the district court's imposition of a particularly rigid and burdensome racially based promotion quota as a method of enforcing those decrees.

[9] Those prior race-conscious measures include the one-black-for-one-white hiring quota implemented in 1972 and the proportional promotion procedure required to be implemented under the 1979 and 1981 consent decrees. The original hiring quota has long since become "law of the case" (*Paradise* v. *Shoemaker*, 470 F. Supp. at 441), and the court of appeals below correctly held that "the validity of the 1979 and 1981 [consent] Decrees [was] not properly before [it]" (Pet. App. 49a n.18). There is thus no occasion for the Court to address the propriety of those earlier remedial measures.

partment, we have no hesitation in agreeing that the first prong of this Court's "strict scrutiny" test is met here.[10]

Although we agree that there exists a "compelling governmental interest" in remedying the Department's past discrimination, we cannot agree that the one-for-one promotion quota sanctioned by the lower courts is a "narrowly tailored" means of achieving that end. As the history of this litigation illustrates, the district court has already imposed a series of race-conscious measures designed to cure the effects of the Department's prior discrimination in hiring. The United States as plaintiff is a party to the 1979 and 1981 consent decrees, which are the "law of the case," and we agreed with Paradise that those decrees should be enforced and that promotions should be ordered, consistently with the consent decrees, in a manner that would have "little or no adverse impact upon blacks seeking promotion to corporal." (Pet. App. 15a-16a & n.10; J.A. 40). We parted company with Paradise below, and we part company with him here, on the question whether a one-black-for-one-white promotion quota is "a legally appropriate means" of accomplishing those objectives. *Wygant*, slip op. 9 (plurality opinion). In approving that

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[10] As we shall explain more fully below (pages 30-35, *infra*), the district court and the court of appeals, in sanctioning the one-for-one promotion quota, also seem to have been pursuing the different and additional objective of attaining some numerical proportion or "racial balance" in the Department's upper ranks. To the extent that the courts sought to justify the challenged quota on that ground, rather than on the ground of remedying the Department's past discrimination in hiring, those courts not only failed to identify a "compelling governmental interest," but relied upon an objective that we believe to be constitutionally impermissible.

quota over our objections, the courts below did not consider "whether lawful alternative and less restrictive means could have been used" to achieve the desired ends. *Wygant*, slip op. 11 n.6 (plurality opinion). Indeed, besides failing to ascertain whether the promotion quota is "narrowly tailored" within the meaning of this Court's decisions, neither the district court [11] nor the court of appeals [12] conducted "strict scrutiny" at all.

1. The quota ordered by the district court appears to have been intended in part as an *in terrorem* enforcement device, designed to induce the Department's compliance with its obligation under the consent decrees to develop and implement a permanent promotion procedure that would have "little or no adverse impact upon blacks" (J.A. 40). The quota was first proposed by Paradise in a "motion to enforce the terms of the * * * consent decree[s]" (J.A. 58, 62). The quota was defended by Paradise on the ground that it would "encourage defendants to develop * * * as soon as possible" a promotion procedure consistent with the consent decrees (J.A. 62). Paradise conceded that the quota would "perhaps not be necessary" if the defendants had timely implemented an acceptable promotion plan, asserting that it was "defendants' perennial non-compliance that necessitates this action" (J.A. 62 n.3). The quota was adopted by the district court in a ruling that granted "the

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[11] See Pet. App. 63a-64a (finding the promotion quota "reasonable" under *United Steelworkers* v. *Weber*, *supra*).

[12] See Pet. App. 35a-42a & n.15 (employing a variety of tests, none strict scrutiny, including whether "the measures employed are reasonable" and whether they are "substantially related" to the objective of eradicating the present effects of past discrimination).

plaintiffs' * * * motion to enforce the terms of the * * * consent decree[s]" (J.A. 128). The *in terrorem* enforcement purpose of the quota is evidenced by the nature of the relief granted, for the quota was to remain in place until "the defendants have developed a promotion plan * * * which meets the prior orders and decrees of the court" (*ibid.*) and was to be abandoned when the Department came into compliance. This *in terrorem* threat, moreover, would inevitably continue for many years, since the Department would be able to demonstrate that a promotion procedure for a particular rank had no "adverse impact" on blacks only when a sufficient number of blacks, consistently with the time-in-grade rules, had reached the next lower rank and thus qualified for promotion. As an enforcement device, therefore, the one-for-one quota was designed to operate against the Department for a long time to come.

Insofar as the promotion quota was intended to coerce the Department's compliance with its obligation to formulate acceptable promotion procedures, or to punish it for its alleged delay in doing so,[13] that

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[13] Although Paradise alleged that the Department had been guility of "perennial non-compliance," in the four years after the signing of the 1979 consent decree, the Department in reality had acted with reasonable diligence to devise a new corporal's examination, to administer and evaluate it pursuant to the 1981 consent decree, and, when objections were raised to the examination, to propose an alternative plan to promote four blacks and eleven whites to corporal on a proportional basis. Since the district court's decision was rendered, the Department has timely proposed, and the district court has tentatively approved, procedures for promotion to corporal and sergeant. See pages 12-13 & note 5, *supra*. Both Paradise and the courts below failed to appreciate how difficult it is to develop and implement selection procedures that satisfy the

race-conscious relief was plainly not "narrowly tailored" to achieve its end. A racial classification is "narrowly drawn" only if it "fit[s] with greater precision than any alternative means" and if no "nonracial approach or * * * more narrowly tailored racial classification could promote the [governmental] interest about as well." *Wygant*, slip op. 11 n.6 (plurality opinion) (original quotation marks omitted). But plentiful alternatives were in fact available to the district court. The court could have imposed stringent contempt sanctions, including heavy fines and attorneys' fees, to remain in effect until the Department produced an acceptable long-term promotion plan. See, *e.g.*, *Sheet Metal Workers*, slip op. 17-19. The court could have considered appointing a trustee or administrator to supervise the Department's progress, or even to make the promotions himself by the proper standard. See *id.* at 56-57. And

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rigorous standards of the *Uniform Guidelines*. As the district court itself previously recognized (*NAACP* v. *Allen*, 340 F. Supp. at 706), the validation of selection procedures is an expensive and time-consuming process usually extending over several years. This is particularly true of jobs, like the state trooper jobs here, that require skills not easily measured by written exams. See also *Connecticut* v. *Teal*, 457 U.S. 440, 463 (1982) (Powell, J., dissenting); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring); *Clady* v. *City of Los Angeles*, 770 F.2d 1421, 1431 (9th Cir. 1985); *Vuyanvich* v. *Republic Nat'l Bank*, 505 F. Supp. 224, 369-370 (N.D. Tex. 1980); *Baker* v. *City of Detroit*, 483 F. Supp. 930, 971 (E.D. Mich. 1979). The task was even more difficult and time-consuming here because the Department also had to ensure that the tests, besides being properly validated, were without an "adverse impact." In any event, despite the absence of a validated long-term selection procedure, the Department has made all promotions since 1980 on a basis that was proportional as between blacks and whites.

if the court found that individual blacks would have been promoted earlier but for the Department's alleged procrastination, and if the court determined that specific relief was needed to remedy that fault, competitive seniority could have been awarded. See *Wygant*, slip op. 15 n.12 (opinion of Powell, J.); *Teamsters* v. *United States*, 431 U.S. 324, 365-371 (1977).

As an injunction that aimed to punish or coerce the Department, in short, the quota ordered by the district court misses the mark by a rather wide margin. "[I]t is not the enjoined party," as the Seventh Circuit has observed, "but rather the persons on the eligibility roster passed over as a result of the quota who bear the real burden" of such an order. *United States* v. *City of Chicago*, 663 F.2d 1354, 1361 (1981) (en banc). Nonminority troopers on the Department's eligibility roster had strong and legitimate expectations that they would be considered for promotion based on their merit and seniority, and, as we explain in greater detail below (pages 38-42, *infra*), the burden that the quota imposed upon them was considerable. As an *in terrorem* enforcement device, therefore, the promotion quota was the wrong gun, and it was aimed at the wrong head.

2. a. In support of the challenged promotion quota, Paradise advanced, and the district court adopted, a second and distinct justification for that race-conscious relief. In his motion to enforce the consent decrees, Paradise emphasized that no promotions to corporal had been made in several years and that the Department urgently needed new promotions to that rank (J.A. 61 & n.1). He argued that the promotion procedure proposed by the Department in 1981 had proven to have an "adverse impact" on blacks (*id.*

at 60-61), with the result that there currently existed no promotion mechanism that complied with the consent decrees (*id.* at 63-64). Paradise accordingly requested that the Department be ordered, not only to discharge its obligation to develop and implement the requisite long-term promotional procedure, but also, on a more immediate basis, "to promote qualified blacks to the corporal position at a rate that does not result in adverse impact and which is within the spirit of * * * the parties' consent decrees" (*id.* at 59, 64). Paradise submitted that, in view of the Department's delay in developing a long-term solution, a one-for-one promotion quota was a "reasonable and necessary" means of making promotions (*id.* at 62 & n.3). The consent decrees, in Paradise's words, required the court to decide "what percentage of the forthcoming * * * promotions should be black" (*id.* at 61).

In response to Paradise's motion, the district court recited the parties' understanding that the Department "need[ed] additional corporals and * * * need[ed] at least 15 of them as soon as possible" (J.A. 119). The court refused to delay the impending promotions until an acceptable long-term plan had been implemented by the defendants. The court accordingly ordered the Department, within two weeks, to "file with the court a plan to promote to corporal, from qualified candidates, at least 15 persons in a manner that will not have an adverse racial impact" (*id.* at 123). The Department responded with a proposal to promote four blacks and eleven whites, a proposal to which the United States as plaintiff expressed no objection. See *id.* at 125-126; Pet. App. 18a-19a.

Confronted with the two proposals that had been placed on the table—the one-for-one quota proposed

by Paradise and the four-and-eleven plan proposed by the Department—the district court clearly erred in opting for the former. If one assumes *arguendo* that some form of race-conscious relief was needed to promote 15 corporals consistently with the consent decrees—decrees that required promotions to be made in a way that would have "little or no adverse impact on blacks" (J.A. 40)—the Constitution mandated that the district court choose a means that was "narrowly tailored" to this end. *Wygant*, slip op. 11, 15 (opinion of Powell, J.). But the Department's proposal, as compared with the extreme quota upon which Paradise insisted, plainly represented the "less intrusive means," *id.* at 15, by which to make the needed promotions within the spirit of the consent decrees (J.A. 59). As the Department explained below, its proposal met "the requirements of the four-fifths rule of the *Uniform Guidelines* concerning adverse impact," the standard that the consent decrees embodied (J.A. 40, 125-126). And the Department's proposal "reflect[ed] the percentage of blacks to whites who took the Corporal's examination" (J.A. 126), and it was thus in harmony with the remedial objective of proportional promotion that, under the consent decrees, the procedure ultimately adopted was required to implement.

b. It cannot be argued, moreover, that the one-for-one promotion quota was justifiable independently of the consent decrees in order to remedy some Title VII violation. No such violation was found or even suggested by the district court as to promotions at this stage of the proceedings (*i.e.*, after 1979). Although the district court did find that the promotion procedure for corporals proposed by the Department in 1981 had an "adverse impact" within the meaning

of the consent decrees, such a finding would clearly be insufficient, absent a finding that those procedures failed to predict job performance, to establish a "disparate impact" Title VII violation. Indeed, the district court declined to hear evidence on the question of job-relatedness because it considered that question to be irrelevant under the consent decrees.[14] And even if there had been a "disparate impact" Title VII violation, the one-for-one quota ordered by the district court would have been an unjustifiable remedy. First, quota relief of any sort is generally unjustified for a mere "disparate impact" violation, since such a fault does not represent either a violation of the Constitution or the kind of flagrant and egregious discrimination that the Court in *Sheet Metal Workers* strongly suggested was necessary to justify quota relief. See, *e.g.*, slip op. 50. Secondly, even if numerical race-conscious relief were appropriate for a "disparate impact" violation, a one-for-one quota could not possibly be justified here because it greatly exceeded the proportion of minorities that had applied for, or were eligible for, promotion to the rank of corporal. Thus, even if the district court had found a Title VII violation, which it did not do, the Department's proposal to promote four blacks and eleven whites represented the extreme outer limit of any appropriate remedy.

3. In sum, to the extent that the district court in awarding relief to Paradise intended to enforce the Department's compliance with the consent decrees, the court was clearly pursuing a legitimate objective. With respect to this objective, however, the court

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[14] *A fortiori,* there can be no suggestion of a "disparate treatment" Title VII violation as to promotions at this stage of the proceedings (*i.e.*, after 1979).

passed over or failed to consider reasonable, efficacious, and less intrusive means of accomplishing its desired ends. The one-black-for-one-white quota that it adopted thus cannot be said to have been "narrowly tailored" under the second prong of the "strict scrutiny" test, and the quota is for that reason violative of the Constitution's equal protection guarantees.[15]

C. Promotion Quotas Like That Ordered By The District Court Cannot Be Justified As "Catch-Up" Measures Designed To Accelerate The Achievement Of Racial Proportionality Or Balance

The courts below seem to have been pursuing a third purpose as well in sanctioning the challenged promotion quota—to redress the "longstanding racial imbalances in the upper ranks of the Department" (Pet. App. 41a, 62a). Those courts appear to have posited the objective of expediting the promotion of blacks in order to attain more rapidly a desired "balance" of races at each level of the trooper force. The one-for-one quota may thus have been designed as a "catch-up" quota that aimed, not simply to remedy the effects of the Department's past discrimination, but to help bring about the "racial mix" that theoretically would have existed in the upper ranks of the Department if it had never discriminated in hiring at all. But discrimination against innocent white employees for the purpose of expediting attainment

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[15] We have not discussed so far the especially intrusive results that flow from the fact that the quota challenged here is a *promotion* quota, because, even without considering that additional factor, the quota is not a "narrowly tailored" means to the ends discussed in the text. We elaborate below (pages 38-42) the particularly disruptive effects of promotion quotas, and those effects are obviously an additional factor that can be considered whatever the purpose of the quota.

of a "balance" of the races in our view goes beyond a proper remedial purpose and is inconsistent with this Court's decisions in *Wygant* and *Bakke*.

1. We start with the general proposition, which we believe to be noncontroversial, that a mere desire to obtain some preferred degree of racial or gender balance is unacceptable under the Constitution. As Justice Powell concluded in *Bakke*, "Preferring members of any one group for no other reason than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." 438 U.S. at 307.

To be sure, eliminating the "effects" of prior discrimination is a permissible remedial purpose, but the elimination of such effects cannot be equated with the attainment of racial balance. The plurality opinion in *Sheet Metal Workers* stated that "affirmative action may be necessary in order effectively to enforce Title VII" because such measures are required either to remedy violations by a defendant who "has engaged in persistent or egregious discrimination" or "to dissipate the lingering effects of pervasive discrimination" (slip op. 50). At the same time, the plurality emphasized that "race-conscious affirmative measures [should] not be invoked simply to create a racially balanced work force" (*ibid.*; see also *id.* at 52).[16] As Justice Powell said in his concurring opinion, "[A] court may not choose a remedy for the

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[16] The Court in *Sheet Metal Workers* noted the court of appeals' rejection, even in the egregious context there, of a requirement by the district court that one minority apprentice be indentured for every white apprentice. The court of appeals had concluded that a rigid one-for-one hiring quota was not needed to ensure that a sufficient number of nonwhites were selected for the apprenticeship program. See *Sheet Metal Workers*, slip op. 13-14 & n.18.

purpose of attaining a particular racial balance; rather, remedies properly are confined to the elimination of proven discrimination. A goal is a means, useful in limited circumstances, to assist a court in determining whether discrimination has been eradicated." Slip op. 5 (Powell, J., concurring). See also *id.* at 7 (O'Connor, J., concurring in part and dissenting in part) ("The imposition of a quota is therefore not truly remedial, but rather amounts to a requirement of racial balance"; a "goal must be intended to serve merely as a benchmark for measuring compliance with Title VII and eliminating the lingering effects of past discrimination").

The plurality opinion in *Sheet Metal Workers* thus establishes that there is a clear distinction between the effects of past discrimination and racial imbalance, and that, even as to a flagrant discriminator, only the former may be the object of remedial efforts. The effects of past discrimination that may be addressed by remedial orders include, for instance, those "informal mechanisms [that] obstruct equal employment opportunities" even after "the employer or union formally ceases to engage in discrimination." Slip op. 24. Specifically, the Court identified as "lingering effects" barring equal opportunity such factors as a reputation for discrimination that discourages minority applicants (*id.* at 24, 51, 52) and an "old-boy" network that restricts access and training to those whites who have "informal contacts with union members" (*id.* at 52). But the only permissible purpose of class-based affirmative measures is to "dismantle prior patterns of employment discrimination and to prevent discrimination in the future" (*id.* at 48). See also *id.* at 49 n.46.

In upholding the membership goal at issue in *Sheet Metal Workers*, the plurality also pointed out

(slip op. 52) that the flexible goal involved there was "not being used simply to achieve and maintain racial balance, but rather as a benchmark" to measure efforts to remedy past discrimination. But the one-for-one quota sanctioned by the courts below could not possibly be rationalized as "benchmark" of this sort. There is generally no reason to assume that a nondiscriminatory employer would select blacks (or whites) in *greater* numbers than their availability, and hence any race-conscious numerical relief designed to serve a prophylactic or "benchmark" function must, at a minimum, necessarily be tied to the percentage of minorities in the relevant labor market. See *Sheet Metal Workers*, slip op. 23 (plurality opinion); *id.* at 4 (Powell, J., concurring in part and concurring in the judgment); *id.* at 7 (O'Connor, J., concurring in part and dissenting in part). Here, of course, the one-for-one quota greatly exceeds the percentage of blacks in the relevant labor market—*viz.*, entry-level troopers eligible for promotion—and thus could not be justified as a flexible "benchmark."

2. Even in the school-desegregation context, this Court's decisions demonstrate that a government which has adopted truly race-neutral admissions policies need not assure a particular "racial mix" in order to cure its prior segregation. Those cases establish that the Constitution does not require, either as a matter of substantive right (*e.g.*, *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 433-434 (1976); *Spencer* v. *Kugler*, 404 U.S. 1027 (1972)), or as a matter of remedy (*Milliken* v. *Bradley (Milliken I)*, 418 U.S. 717, 740-741 (1974); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22-25, 31-32 (1971)), any particular degree of racial balance in a state's activities. As the Court wrote in *Swann*, "[t]he constitutional command to desegre-

gate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S. at 24. Thus, even in the school cases—where insisting on racial balance would not disadvantage any innocent nonminorities, since all school children will receive a public education—racial balance is not required. *A fortiori* here, the Constitution cannot require racial balance at the severe expense of innocent nonminority persons.

The Constitution of course requires that the government refrain from any action intentionally designed to exclude or segregate persons on the basis of race. *Dayton Bd. of Educ.* v. *Brinkman* (*Dayton I*), 433 U.S. 406, 413 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). And the Constitution requires that where, as here, the government has discriminated on the basis of race, it undertake the remedial efforts necessary to eliminate the constitutional violation and the conditions that flow therefrom. *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267, 282 (1977). See *Dayton I*, 433 U.S. at 417, 420. But since the condition that offends the Constitution is racial discrimination (subtle or otherwise), not the lack of racial balance, the prior constitutional violation is remedied by establishing a system that "exclude[s] no [person] of a racial minority * * *, directly or indirectly, on account of race." *Swann*, 402 U.S. at 23. The Constitution thus does not require that the government, in seeking to eradicate the effects of its past discrimination, employ "catch-up" quotas or similar race-conscious steps to accelerate progress toward some preconceived notion of a desirable "racial balance."

In *Bazemore* v. *Friday*, No. 85-93 (July 1, 1986), this Court applied similar principles in a context not

far removed from the present case. There, the Court was required to decide what actions were necessary to cure a prior discriminatory admissions policy of 4H Clubs operated by an agency of the State of North Carolina. It was undisputed that there remained a substantial racial imbalance among the Clubs, even though the agency had adopted a nondiscriminatory admissions policy. Slip op. 1 (White, J., for the Court). It was equally clear that this imbalance was traceable, at least in part, to the *de jure* segregated period. The Court nevertheless held that any constitutional or statutory violation was cured when the agency "ha[d] taken affirmative action to change its [segregative] policy and * * * establish[ed] what is concededly a nondiscriminatory admissions system." *Id.* at 3; see also *id.* at 2. Although nothing approaching racial balance had been achieved, the Court concluded that the State had met federal regulatory requirements "to take 'affirmative action' to overcome the effects of prior discrimination in its programs." *Id.* at 3. As the Fifth Circuit wrote in an earlier phase of the instant litigation, "equality of access satisfies the demand of the Constitution." *NAACP* v. *Allen*, 493 F.2d at 621. The Constitution does not require, and in our view should not be interpreted to permit, "catch-up" quotas designed to achieve racial balance.[17]

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[17] Progress toward racial balance in the upper levels of the Alabama Department of Public Safety could be substantially expedited by a variety of race-neutral devices designed to eliminate arguably arbitrary barriers to promotion. For example, the Department's time-in-grade requirement for promotion eligibility could be reduced. And the Department could be ordered to modify its policy of promoting only from within, a modification that would permit it to hire black (or white) troopers laterally for upper-rank positions.

D. The One-For-One Promotion Quota, Whatever Its Purpose, Unnecessarily And Severely Burdens Innocent Persons, And It Therefore Fails To Satisfy Strict Scrutiny

Whatever purpose is offered for the one-for-one promotion quota—whether as a means of coercing compliance with the consent decrees, as a method of allocating the 15 promotions immediately needed, or as a way of attaining racial balance—this quota was not a "narrowly tailored" means of achieving the goal. An extreme one-for-one quota was not necessary to enable blacks to progress with deliberate speed into the upper ranks of the Department. And that quota seriously disadvantaged identified nonminority individuals because of the color of their skin.

1. As we have noted above, the quota challenged here was superimposed upon a bedrock of earlier race-conscious relief—the hiring quota ordered in 1972, and the proportional promotion remedy set forth in the 1979 and 1981 consent decrees—which had already proven, or had the potential to prove, successful in eliminating the effects of past discrimination. The hiring quota had produced by 1983 a racially balanced trooper or "entry-level" force, and the results had begun to manifest themselves in the upper ranks. The district court recognized that new black troopers would initially be clustered in the lower echelons, until they gained sufficient time in grade to earn promotions. *Paradise* v. *Shoemaker*, 470 F. Supp. at 441. Of the ten troopers promoted to corporal after the 1979 consent decree, four were black. For the next set of promotions, the Department proposed to promote four blacks and eleven whites, a proposal that would have raised the percentage of black corporals from 6% to 9.8%. See J.A. 62, 133. The promotion procedures mandated by the consent decrees, which

were in fact implemented shortly after the district court acted, have brought three additional blacks to the rank of corporal and two to the rank of sergeant. See pages 12-13 & note 5, *supra*. As this Court has observed in a somewhat different context, nondiscriminatory hiring and promotion practices ordinarily "will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Teamsters* v. *United States*, 431 U.S. at 339-340 n.20. Because the earlier race-conscious relief ordered by the district court and implemented pursuant to the consent decrees had succeeded in remedying the Department's past hiring discrimination and had already made substantial progress in achieving "racial balance," the one-for-one promotion quota was unnecessary no matter how the quota's purpose is characterized.

It is true, of course, that a one-for-one promotion quota may succeed in integrating the upper levels of a work force more rapidly than a nondiscriminatory policy embodying equality of access. But before seeking to advance "racial balance" in this way, a court must consider that such quotas manifest racial discrimination in its least subtle form. When all promotions are allocated on a racial basis—particularly when the basis is one black for every white—promotion decisions inevitably become suspect in the eyes of some. If racial preferences ever stigmatize their beneficiaries—and various members of the Court have recognized that they can and do [18]—then it is pre-

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[18] See *Fullilove* v. *Klutznick*, 448 U.S. at 545, 547 (Stevens, J., dissenting); *id.* at 531 (Stewart, J., dissenting); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 173-174 (1977) (Brennan, J., concurring in part); *Bakke*, 438 U.S. at 298 (opinion of Powell, J.); *DeFunis* v. *Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting); see also Posner, *The*

cisely such "catch-up" quotas that courts should strive to avoid. Indeed, the risk of stigma will be especially great where it is clear that the quota's high-ranking beneficiaries have received preferential treatment in both hiring *and* promotion.

2. Besides being unnecessary, and perhaps being counterproductive, in remedying the effects of past discrimination, the relief sanctioned below fails "strict scrutiny" because of its exceptional and unwarranted intrusiveness upon the rights of innocent third parties. The district court ordered and the court of appeals approved the most intrusive of all race-conscious remedies—a rigid numerical quota. As Alan Bakke was obviously excluded from competing for 16 out of 100 seats in medical school (see 438 U.S. at 315-316 (opinion of Powell, J.)), application of the quota involved here absolutely excludes white troopers from competing for one out of every two promotions. And while that quota in practice will probably be limited in time and effect, the principle that such quotas are highly disfavored nevertheless applies.

A one-for-one promotion quota does considerable harm to a discrete group of innocent non-minority individuals.[19] To achieve the social good of ending racial discrimination, "innocent persons may be called

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DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 17 & n.35.

[19] The displaced white applicants for promotion cannot be said to have "acquiesced" in any sense. Compare *Fullilove*, 448 U.S. at 479 (opinion of Burger, C.J.) (voluntary recipients of federal funds). See also *Wygant*, slip op. 7 (Stevens, J., dissenting) (ratification of union contract). Nor is it likely that these individuals—many of whom are entry-level troopers hired since 1972, when the Department ended its hiring discrimination—have in the past "reaped competitive benefit" relative to black promotional applicants. *Fullilove*, 448 U.S. at 485 (opinion of Burger, C.J.).

upon to bear some of the burden of the remedy." *Wygant*, slip op. 12 (opinion of Powell, J.). But whether that summons is constitutionally permissible depends in part upon "the diffuseness of the burden" to which nonminorities are subjected. *Sheet Metal Workers*, slip op. 6 n.3 (Powell, J., concurring in part and concurring in the judgment), citing *Wygant*, slip op. 14-15 (opinion of Powell, J.). The loss of one's job, as contrasted with the failure to receive a job offer to begin with, is an unacceptable result of affirmative action in virtually all circumstances. Compare *Firefighters Local Union No. 1784* v. *Stotts* (layoffs), and *Wygant* (layoffs), with *Sheet Metal Workers* (hiring and training), and *Weber* (training). This is in part because a layoff or discharge works a grievous disruption of identifiable individuals' previously settled expectations and is in no sense "diffused" through society as a whole.

The promotion quota involved here, like the layoff remedies that the Court has previously addressed, "impose[s] the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Wygant*, slip op. 14-15 (opinion of Powell, J.). Unlike race-conscious hiring relief, a one-for-one promotion quota casts its onus not on the general public, but on a finite and often rather small number of identifiable individuals whose opportunities for advancement are significantly reduced. Particularly in public service careers, where long tenure and regular advancement are more the rule than the exception, an individual who contemplates or has already invested years in his job has legitimate expectations transcending those of an applicant for an entry-level position.[20] Eligibility for

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[20] Figures compiled by the Bureau of Labor Statistics show that 32% of employees in the "protective service" category—

promotion is a major part of the "equity" in seniority built up by an employee. See *Wygant*, slip op. 14 (opinion of Powell, J.); Fallon & Weiler, Firefighters *v.* Stotts: *Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. 1, 58, 60 & n.222, 67. See also *Franks* v. *Bowman Construction Co.*, 424 U.S. 747, 787 (1976) (opinion of Powell, J.) ("consideration for promotion" an element of competitive seniority); *Hishon* v. *King & Spaulding*, 467 U.S. 69, 76-77 (1984) (record reflected that the possibility of being made a partner was a major inducement to accepting employment). The intrusiveness of a one-for-one promotion quota is particularly marked where, as in the instant case, it is coupled with a previously existing hiring quota. For those troopers hired since 1972—and many current applicants for promotion to corporal can be expected to fall within that group—this will be the second time that they have encountered a racial quota, impeding first their access into, and then their advancement through, the Department.[21]

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firefighters, police, prison guards, etc.—have held their jobs for 10 years or more, whereas only 27% of the employed population at large have held their jobs for that length of time. *Current Population Survey* (Jan. 1983) (unpublished compilation). A recent private-sector survey concluded that seniority plays a significant role in both union and nonunion promotions. K. Abraham & J. Medoff, National Bureau of Economic Research, *Years of Service and Probability of Promotion* (1983). And, "[o]n average, black workers now have accumulated seniority roughly equal to that of whites." Fallon & Weiler, Firefighters *v.* Stotts: *Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. 1, 65 & n.238.

[21] Although the Fifth Circuit in an earlier stage of this litigation recognized that "[t]he problems inherent in quota relief assume different parameters in the promotion, rather than hiring, context" (*NAACP* v. *Allen*, 493 F.2d at 622 n.12), the Eleventh Circuit below did not address that distinction in sustaining the promotion quota now challenged. Other courts of

We do not mean to suggest that an absolute constitutional line should be drawn between hiring and promotional preferences. All race-conscious remedies are constitutionally suspect, and all must meet the same exacting standards. See *Sheet Metal Workers*,

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appeals, however, have joined the Fifth Circuit in emphasizing the important differences between preferences in hiring and promotion. In reversing a promotion quota in *Kirkland* v. *New York State Dep't of Correctional Services*, 520 F.2d 420 (1975), cert. denied, 429 U.S. 823 (1976), the Second Circuit declared that "[s]o long as civil service remains the constitutionally mandated route to public employment in the State of New York, no one should be 'bumped' from a preferred position on the eligibility list solely because of his race." Concluding that the promotion quota represented "constitutionally forbidden reverse discrimination," the court explained that where finite numbers of candidates are competing for promotions,

> We can no longer speak in general terms of statistics and class groupings. We must address ourselves to individual rights.
>
> A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be bypassed solely because they are white.

520 F.2d at 429 (footnote omitted). See also *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), cert. denied, 440 U.S. 981 (1979); *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973) (invalidating a promotion quota for ranks above patrolman, reasoning that "the imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone"); *United States* v. *City of Chicago*, 663 F.2d 1354, 1361 (7th Cir. 1981). Cf. *Firefighters* v. *Stotts*, 467 U.S. at 579 n.11 (noting that, in the layoff context, "[l]ower courts have uniformly held that relief for actual victims does not extend to bumping employees previously occupying jobs").

slip op. 6 (Powell, J., concurring in part and concurring in the judgment). But a quota that thrusts its entire burden on a few nonminority individuals, as the one-for-one promotion quota does here, will rarely qualify as "narrowly tailored" to achieve its goal. If nonminority individuals, at each step in their careers, find themselves excluded from employment opportunities because of the color of their skin, "affirmative action" will come to resemble for them the systematic and pervasive discrimination so long and so tragically directed at generations of blacks. "The ultimate goal must be to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race." *Fullilove*, 448 U.S. at 547 (Stevens, J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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